IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER KELLY, individual and on behalf of all others similarly situated, Plaintiff, v. VERIZON PENNSYLVANIA, LLC, VERIZON ONLINE PENNSYLVANIA PARTNERSHIP, and VERIZON PENNSYLVANIA, Defendants.	Civil Action No. 2:16-cv-05672-MSG

BRIEF OF DEFENDANTS VERIZON PENNSYLVANIA, LLC AND VERIZON ONLINE LLC IN SUPPORT OF THEIR MOTION TO STAY AND TO COMPEL ARBITRATION

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Defendants Verizon Pennsylvania, LLC and Verizon Online LLC (as successor to Verizon Online Pennsylvania Partnership) ("Verizon") hereby move to stay the action filed by plaintiff Christopher Kelly ("Plaintiff") and to compel arbitration of Plaintiff's claims.

PRELIMINARY STATEMENT

This putative class action relates to services that Verizon provided Plaintiff pursuant to contracts that expressly require all disputes to be "resolve[d] . . . only by arbitration or in small claims court" and "does not allow class or collective arbitrations." Given this plain contract language and the strong federal policy favoring arbitration, it is clear that Plaintiff is obligated to resolve his dispute in arbitration and not in this Court.

Upon purchasing Verizon services, Plaintiff agreed to be bound by Verizon's customer agreements. Those agreements contained arbitration provisions and class action waivers. Courts throughout the country that have considered Verizon's customer contracts requiring arbitration and have repeatedly held that the contracts are binding and that the arbitration provisions and class action waivers are enforceable. *See Sacchi v. Verizon Online LLC*, No. 14-cv-423 (RA), 2015 WL 765940 (S.D.N.Y. Feb. 23, 2015), *reconsid. denied*, 2015 WL 1729796 (S.D.N.Y. Apr. 14, 2015); Order, *Mayer v. Verizon New Jersey, Inc.*, No. 13-cv-3980 (FSH), (D.N.J. May 6, 2014), ECF No. 31; *Joaquin v. DirecTV Grp. Holdings, Inc.*, No. 15-cv-8194 (MAS) (DEA), 2016 WL 4547150, at *2-*5 (D.N.J. Aug. 30, 2016); *Klein v. Verizon Commc'ns, Inc.*, 920 F. Supp. 2d 670 (E.D. Va. 2013). Thus, Plaintiff is bound by the arbitration provisions in his contracts with Verizon.

The arbitration provisions here apply broadly to "any dispute that in any way relates to or arises out of this agreement or from any equipment, products and services you receive from us (or from any advertising for any such products or services)." Plaintiff's claims relate to the parties' agreements, and the services and equipment allegedly received by Plaintiff from

Verizon, and thus fall squarely within the scope of the contracts' arbitration provisions. Controlling law dictates that where, as here, a binding arbitration agreement exists, courts must enforce the parties' agreement to arbitrate and compel arbitration. Enforcement of arbitration agreements is strongly favored, and any ambiguity as to arbitrability should be resolved in favor of arbitration. Class action waivers are also valid and enforceable. Accordingly, Plaintiff should be compelled to arbitrate his claims against Verizon, and he must do so on an individual basis, not on behalf of a putative class.

STATEMENT OF FACTS

Plaintiff alleges that he was "required" by Verizon[1] to lease multiple set-top boxes from Verizon in order to view FiOS television programing on multiple televisions, but that multiple set-top boxes are not actually necessary to view FiOS television programing on multiple televisions, and that Verizon's actions violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). *See* Compl., ¶¶ 6-7. All of Plaintiff's claims must be arbitrated pursuant to his contracts with Verizon.

A. Plaintiff's Contracts with Verizon

Plaintiff purchased Verizon FiOS television, internet and telephone services as part of a "Triple Play" bundle in August 2014, and chose to lease two set-top boxes associated with his television service. *See* Compl., ¶¶ 48-49, Certification of Douglas Collins ("Collins Cert."), ¶¶ 2-3. Verizon provided the FiOS internet and television services, and the set-box boxes, to Plaintiff pursuant to contracts between Verizon and Plaintiff called the Verizon Online Terms of

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[1] Plaintiff names three defendants in this action – Verizon Pennsylvania, LLC, Verizon Online Pennsylvania Partnership, and "Verizon Pennsylvania" – and refers to them collectively in his Complaint, "[f]or the sake of brevity and clarity." Compl., ¶ 17. However, "Verizon Pennsylvania" does not exist and did not provide any of the services or equipment at issue here. *See* Certification of Veronica C. Glennon ("Glennon Cert."), ¶ 2. Rather, Verizon-brand FiOS television service is provided by defendant Verizon Pennsylvania, LLC and Verizon-brand set-top boxes are leased by Verizon Online LLC, successor to defendant Verizon Online Pennsylvania Partnership. *See id*. at ¶¶ 3-4.

Service (the "Internet Agreement") and the Verizon FiOS TV Terms of Service (the "TV Agreement") (collectively, the "Agreements"). *See* Certification of Cindy Cumba-Ruiz ("Cumba-Ruiz Cert."), ¶¶ 2-4, Exs. A & B.

Just as it does today, in 2014 Verizon had in place standardized business practices to ensure that its customers receive the Agreements before service is provided. *See* Collins Cert. at ¶ 5. Pursuant to those practices, when a Verizon customer service technician installed FiOS services at a new customer's residence, the technician provided the customer with a "Welcome Kit" that included, among other items, both of the Agreements. *See id*. at ¶¶ 6, 9.

Verizon's records show that a Verizon technician installed Plaintiff's Triple Play services at the residence located at 221 W. Duval Street, Philadelphia, Pennsylvania on August 15, 2014. *See id*. at ¶ 3. Pursuant to Verizon's standard business practices, the technician provided Plaintiff with the Welcome Kit, which included the Agreements. *See id*. at ¶¶ 6, 9.

Pursuant to the TV Agreement, "[the customer's] acceptance of this Agreement occurs upon the earlier of: (a) [the customer's] electronic or oral acceptance during the submission of your order; or (b) [the customer's] use of the Service." TV Agreement, § 1. After receiving the TV Agreement and after Verizon installed his FiOS television service, Plaintiff used the FiOS television service, agreeing to be bound by the TV Agreement. Plaintiff concedes that Verizon provided the FiOS television service and set-top boxes at issue pursuant to a "service contract [that] began in August 2014." Compl., ¶ 49. Plaintiff also concedes that he continues to be a FiOS television and internet customer. *See id*. at ¶ 13; Collins Cert., ¶ 4.

Likewise, pursuant to the Internet Agreement, the customer's acceptance "occurs upon the earlier of: (a) [the customer's] acceptance of this Agreement electronically during an online order, registration or when installing the Software or the Equipment; [or] (b) [the customer's] use of the Service. . . ." Internet Agreement, § 1. Plaintiff accepted the terms of the Internet Agreement by both methods. As part of the installation of his FiOS internet services, Plaintiff accepted the terms of the Internet Agreement while completing Verizon's Web Based Activation system. *See* Collins Cert., ¶ 9-15. Plaintiff also used, and continues to use, his FiOS internet services. *See id.* at ¶ 4.

The TV Agreement is between Plaintiff and both Verizon Pennsylvania, LLC, which provided the video service, and Verizon Online LLC (as successor to Verizon Online Pennsylvania Partnership), which provided the set-top boxes. *See* TV Agreement, at Exhibit A; Glennon Cert., ¶ 6. The Internet Agreement is between Plaintiff and Verizon Online LLC. *See* Internet Agreement, p. 1.

B. The Agreements' Arbitration Provisions

The Agreements require that any dispute arising out of or relating to the agreement or any services or equipment Verizon provides be either arbitrated or brought in small claims court:

> YOU AND VERIZON BOTH AGREE TO RESOLVE DISPUTES ONLY BY ARBITRATION OR IN SMALL CLAIMS COURT. . . . WE ALSO BOTH AGREE THAT:
>
> . . . any dispute that in any way relates to or arises out of this agreement or from any equipment, products and services you receive from us (or from any advertising for any such products or services) will be resolved by one or more neutral arbitrators before the American Arbitration Association ("AAA").
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> [TV Agreement, §§ 17, 17(a); *see also* Internet Agreement, §§ 18, 18.1.]

The Agreements also offer customers two additional choices: customers can opt to mediate the dispute or ask an appropriate government agency to seek relief against Verizon on their behalf. *See* TV Agreement, §§ 16, 17, 17(a); Internet Agreement, §§ 17, 18, 18.1.

Regardless of the dispute resolution method selected, however, class actions are waived. *See* TV Agreement, § 17(c); Internet Agreement, § 18.3.

If the customer opts for arbitration, the Agreements provide that Verizon, and not the customer, will bear the expense:

> Verizon will pay any filing fee that the AAA charges you for arbitration of the dispute. . . . . If that arbitration proceeds, we'll also pay any administrative and arbitrator fees charged later, as well as for any appeal to a panel of three new arbitrators (if the arbitration award is appealable under this agreement).
>
> [TV Agreement, § 17(d); *see also* Internet Agreement, § 18.4.]

Similarly, the Agreements provide that Verizon will, in certain circumstances and even if not required to do so by applicable law, pay a prevailing customer's attorneys' fees:

> We may, but are not obligated to, make a written settlement offer any time before the arbitration evidentiary hearing begins . . . . If you do not accept the offer and the arbitrator awards you an amount of money that is more than our offer but less than $5000, or if we do not make you an offer, and the arbitrator awards you any amount of money but less than $5000, then we agree to pay you $5000 instead of the amount awarded. In that case we also agree to pay any reasonable attorneys' fees and expenses, regardless of whether the law requires it for your case.
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> [TV Agreement, § 17(e); *see also* Internet Agreement, § 18.5.]

These provisions and others[2] make the arbitration required by the Agreements convenient, virtually cost-free and expeditious for Verizon's customers.

[2] For example, the arbitration will take place in the county where the services are provided, and depending on the value of the claim, the customer may choose whether the arbitration will be carried out based only on documents or through an in-person or telephonic hearing, and the loser may appeal the result to a new arbitration panel. *See* TV Agreement, § 17(b); Internet Agreement, § 18.2.

ARGUMENT

THE AGREEMENTS' ARBITRATION PROVISIONS ARE ENFORCEABLE AND REQUIRE PLAINTIFF TO ARBITRATE HIS CLAIMS

Arbitration must be compelled where (a) a valid agreement to arbitrate exists; and (b) the agreement encompasses the claims at issue. *See Trippe Mfg. Co. v. Niles Audio Corp*, 401 F.3d 529, 532 (3d Cir. 2005); *see also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91-92 (2000) (party seeking to invalidate arbitration agreement bears the burden of showing why agreement is invalid). Enforcement of arbitration agreements is strongly favored, and any ambiguity as to the arbitrability of a claim should be resolved in favor of arbitration. *See id.* (noting "presumption in favor of arbitrability"); *accord Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* further reinforces the already strong "federal policy favoring arbitration agreements." 131 S. Ct. 1740, 1749 (2011). In *Concepcion,* the Court also held that the Federal Arbitration Act ("FAA") preempts and precludes any state law that purports to void as unconscionable or as against public policy arbitration agreements containing class action waivers. *Id.*[3]

Section 4 of the FAA "requires courts to compel arbitration 'in accordance with the terms of the agreement' upon the motion of either party to the agreement." *Concepcion,* 131 S. Ct. at 1748 (quoting 9 U.S.C. § 4). Pursuant to Section 3 of the FAA, a court must stay a proceeding in favor of arbitration "upon being satisfied that the issue involved in such suit or proceeding is

[3] The FAA applies here for two separate reasons. First, the Agreements specifically provide so. *See* TV Agreement, § 17(a) ("The Federal Arbitration Act applies to this agreement."); Internet Agreement, § 18.1 (same). Second, the FAA, by its terms, broadly applies to arbitration provisions contained in all contracts that, like those at issue here, "evidenc[e] a transaction involving commerce." 9 U.S.C. § 2; *see also Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) ("term 'involving commerce' in the FAA . . . ordinarily signal[s] the broadest permissible exercise of Congress' Commerce Clause power"); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 276-77 (1995) (directing that FAA be construed broadly to apply to all transactions affecting interstate commerce).

referable to arbitration under such agreement." 9 U.S.C. § 3; *see also Lloyd v. HOVENSA, LLC.*, 369 F.3d 263, 269 (3d Cir. 2004) ("whenever suit is brought on an arbitrable claim, the Court 'shall' upon application stay the litigation until arbitration has been concluded").

Plaintiff agreed to be bound by the terms of the Agreements. *See* Statement of Facts ("SOF"), Sect. A, *supra*. All of Plaintiff's claims against Verizon are covered by the broad arbitration provisions to which he agreed. Accordingly, the Court should stay this action and compel arbitration.

A. Plaintiff Received the Agreements and Accepted Their Terms

Plaintiff agreed to the terms of the Agreements, including the arbitration provision. Plaintiff concedes that Verizon provided the services pursuant to a "service contract [that] began in August 2014." Compl., ¶ 49.

Verizon's business practices at the time confirm that Plaintiff received a copy of the Agreements and accepted their terms. *See* SOF, Sect. A, *supra*. The TV Agreement provided that: "Your acceptance of this Agreement occurs upon the earlier of: (a) your electronic or oral acceptance during the submission of your order; or (b) your use of the Service." TV Agreement, § 1. The Internet Agreement provided for the same methods of acceptance. *See* Internet Agreement, § 1. After receiving the Agreements, Plaintiff subsequently used his FiOS television and internet services, thereby agreeing to the terms of the Agreements.

Plaintiff's use of his FiOS services after receiving the Agreements constitutes valid acceptance of the Agreements. For example, in *Schwartz v. Comcast Corp.*, 256 F. App'x 515 (3d Cir. 2007), Comcast moved to compel arbitration pursuant to a Subscriber Agreement. Relying on evidence that Comcast "had a policy of providing a 'welcome packet,' including a copy of its 'Subscriber Agreement,' to new customers of its internet services" (*id.* at 516-17), the Third Circuit held:

> Comcast's evidence of its consistent practice regarding delivery of subscription agreements and of the conduct of the parties in this case constitute prima facie evidence that Schwartz was aware that the services he accepted were being offered pursuant to a subscription agreement.
>
> [*Id*. at 518.]

The court also held that the plaintiff's use of the services constituted acceptance of the Subscriber Agreement:

> We conclude that the conduct of the parties shows that their relationship was governed by the Subscriber Agreement. The Subscriber Agreement is activated when internet service is installed, because it states: "The term of this Agreement shall commence upon the installation of your Service." . . . . Comcast offered internet service under the terms of its Subscriber Agreement, and Schwartz accepted the service, so the terms of the contract are provided by the Subscriber Agreement. . . . [T]he terms of the contract were available to Schwartz via the web site, and thus they are binding, despite the fact that he was unaware of them. Comcast has demonstrated that Schwartz was aware of a subscription agreement, which included an arbitration clause.
>
> [*Id*. at 519-20.]

This Court has followed suit. For example, in *Martin v. Discover Bank*, No. 12-cv-2469, 2012 WL 6197992 (E.D. Pa. Dec. 3, 2012), the defendants moved to compel arbitration pursuant to an arbitration provision contained in their customer agreement. In support of the motion, as Verizon does here, the defendants submitted an affidavit explaining the defendants' standard business practice to supply the customer agreement to new customers and confirmed that the agreement was provided to the plaintiffs. *See id*. at *2. The court found that "Defendants' business records are sufficient to create a presumption that the arbitration provisions were included in mailings that were received by the plaintiffs." *Id*. at *3.

Moreover, like Verizon's Agreements here, the customer agreement in Martin "provided that each plaintiff, by using his or her Discover Card, agreed to the terms of his or her

Agreement." *Id*. at *2. The court granted the defendants' motion to compel arbitration pursuant to their customers agreement, holding that, "[a]ll of the named plaintiffs used their Discover Cards after receiving the Agreements, thus accepting their terms" and further held that, when those agreements were amended to include arbitration provisions, the "[p]laintiffs' continued use of their Discover Cards constituted acceptance of the arbitration agreements." *Id*. at *2-*3; *see also White v. Sunoco Inc*., No. 15-cv-4595, 2016 WL 2988976, *5 (E.D. Pa. May 24, 2016) ("By performing under the Agreement – i.e., by using his credit card and maintaining an open credit line for more than two and a half years – Plaintiff accepted the Agreement's terms"); *Elinich v. Discover Bank*, No. 12-cv-1227, 2013 WL 342682, *2 (E.D. Pa. Jan. 29, 2013) (granting motion to compel arbitration, finding that the arbitration agreement, which was accepted by customer upon use, "have consistently been upheld by courts in this Circuit.").

Plaintiff also accepted the Internet Agreement when completing the Web Based Activation system. *See* SOF, Sect. A, *supra*. Such acceptance is binding. *See, e.g., Feldman v. Google, Inc*., 513 F. Supp. 2d 229, 238 (E.D. Pa. 2007) ("Plaintiff had to have had reasonable notice of the terms. By clicking on 'Yes, I agree to the above terms and conditions' button, Plaintiff indicated assent to the terms. Therefore, the requirements of an express contract for reasonable notice of terms and mutual assent are satisfied. Plaintiff's failure to read the Agreement, if that were the case, does not excuse him from being bound by his express agreement.").

Numerous courts throughout the country have examined the methods that customers accept Verizon's customer contracts, and have held that either use of the services or completing the Web Based Activation system is sufficient evidence of acceptance. *See Sacchi*, 2015 WL

765940 at *5; *Mayer*, May 6, 2014 Order at 2-3; *Joaquin*, 2016 WL 4547150 at *2-*5; *Klein*, 920 F. Supp. 2d at 680.

By accepting the Agreements, Plaintiff agreed to be bound by the arbitration provision therein.

B. All of Plaintiff's Claims Are Arbitrable Pursuant to the Agreements

The arbitration provisions require arbitration of claims arising out of, or relating to, "this agreement or from any equipment, products and services you receive from us (or from any advertising for any such products or services)." TV Agreement, § 17(a); Internet Agreement, § 18.1. All of Plaintiff's claims relate to the Agreements and Verizon's provision of equipment and services to Plaintiff. Specifically, Plaintiff alleges that he was "required" to lease multiple set-top boxes from Verizon in order to view FiOS programing on multiple televisions, but that multiple set-top boxes are not actually necessary to view FiOS programing on multiple televisions. *See* Compl., ¶¶ 6-7. These claims relate directly to Verizon's provision of equipment and services to Plaintiff. Moreover, Plaintiff's claims relate directly to Verizon's billing practices regarding set-top boxes, which are governed by the Agreements. Thus, Plaintiff's claims arise out of and relate to the Agreements.

Plaintiff's claims focus on Verizon's FiOS television service and set-top boxes associated with that service. Thus, the arbitration provision in the TV Agreement requires the arbitration of these claims. Moreover, the arbitration provision in the Internet Agreement between Plaintiff and Verizon Online LLC also requires arbitration of Plaintiff's claims against Verizon Online LLC (successor to named Defendant Verizon Online Pennsylvania Partnership) because it covers any claims related to any equipment or service provided by Verizon Online LLC, and is not limited to claims related to internet service. *See* Internet Agreement, § 18.1 (requiring arbitration of "any dispute that in any way relates to or arises out of . . . any equipment, products and service you receive from [Verizon Online LLC]").

Accordingly, Plaintiff's claims against Verizon are well within the broad scope of the Agreements' arbitration provisions.

C. **The Class Action Waivers in the Agreements are Enforceable**

Class action waivers in arbitration provisions must be enforced; this is now black letter law, having been repeatedly confirmed by the Supreme Court. In *Concepcion*, the Court found that requiring class procedures in arbitration despite a class action waiver would frustrate the ability of private parties to arbitrate according to the terms of the agreement and hinder the efficient resolution of disputes through streamlined dispute resolution proceedings. *See Concepcion,* 131 S. Ct. at 1748-53. Simply put, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id*. at 1748; *see also Am. Exp. Co. v. Italian Colors Rest*., 133 S. Ct. 2304, 2309 (2013) (enforcing arbitration provision and class action waiver because the FAA "reflects the overarching principle that arbitration is a matter of contract [a]nd consistent with that text, courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted") (internal citations and quotations omitted). Applying these standards, other courts have held that the class action waivers in Verizon's agreements are enforceable. *See Mayer* Order, at 3; *Sacchi*, 2015 WL 765940 at *10.

Here, the Agreements expressly "do[] not allow class or collective arbitrations." TV Agreement, § 18.3. Thus, Plaintiff may not pursue his claims on a class basis. Accordingly, this action should be stayed, and Plaintiff should be compelled to arbitrate his claims on an individual basis, rather than on behalf of a putative class.

CONCLUSION

For the foregoing reasons, Verizon respectfully requests that this action be stayed and that Plaintiff be compelled to arbitrate his claims against Verizon in accordance with the parties' agreements.

Dated: November 23, 2016

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